



United States Department of the Interior
OFFICE OF THE SECRETARY
Washington, DC 20240

IN REPLY REFER TO:
7202.4-OS-2018-01157

September 30, 2019

Via email: 53560-87201390@requests.muckrock.com

Mr. Jimmy Tobias
MuckRock News
DEPT MR 58611
411A Highland Avenue
Somerville, MA 02144

Dear Mr. Tobias:

On July 23, 2018, you filed a Freedom of Information Act (FOIA) seeking the following:

[A]ll written or electronic communications, including attachments, sent or received by Deputy Assistant Secretary Aurelia Skipwith, or her executive assistant, that contain one or more of the following words or phrases: Endangered Species Act", "ESA", "endangered species", "threatened species", "migratory bird", "MBTA", "sage grouse", "Texas hornshell", "sagebrush lizard", "incidental take", "4(d) rule" and/or "4(d)". This request pertains to records produced between January 1, 2018 and the date this request is processed.

You request was received in the Office of the Secretary FOIA office on May 9, 2018, and assigned control number **OS-2018-01157**. Please cite this number in any future correspondence or communications with the Office of the Secretary regarding your request. We are writing today to provide an interim response to your request on behalf of the Department of the Interior. Our office reviewed 717 pages of which 12 pages were not responsive to your request. Please find attached one (1) file consisting of 705 pages. Of those 705 pages, 698 pages are being released in full and seven (7) pages contains redactions as described below.

Portions of the enclosed documents have been redacted pursuant to Exemption 6 of the FOIA (5 U.S.C. § 552(b)(6)) because they fit certain categories of information:

Personal information
Secretary's email address
Non-public email addresses

Exemption 6 allows an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The courts have held that the phrase "similar files" involves all information that applies to a particular person. Hertzberg v. Veneman, 273 F. Supp. 2d 67, 85 n.11 (D.D.C. 2003).

To determine whether releasing requested information would constitute a clearly unwarranted invasion of personal privacy, we are required to perform a “balancing test.” This means that we must weigh the individual’s right to privacy against the public’s right to disclosure.

- (1) First, we must determine whether the individual has a discernable privacy interest in the information that has been requested.
- (2) Next, we must determine whether release of this information would serve “the public interest generally” (i.e., would “shed light on the performance of the agency’s statutory duties”).
- (3) Finally, we must determine whether the public interest in disclosure is greater than the privacy interest of the individual in withholding.

The information that we are withholding consists of personal information and non-public email addresses, and we have determined that the individuals to whom this information pertains have a substantial privacy interest in it. Additionally, we have determined that the disclosure of this information would shed little or no light on the performance of the agency’s statutory duties and that, on balance, the public interest to be served by its disclosure does not outweigh the privacy interest of the individuals in question, in withholding it. Nat’l Ass’n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989).

We are also withholding the Secretary’s email address based on our determination that the Secretary has a substantial privacy interest in the information that is not outweighed by the public interest to be served by its disclosure. Shurtleff v. EPA, 991 F. Supp. 2d 1, 39-40 (D.D.C. 2013).

In summation, we have determined that release of the information that we have withheld would constitute a clearly unwarranted invasion of the privacy of these individuals, and that it therefore may be withheld, pursuant to Exemption 6.

Portions of the enclosed documents have been redacted pursuant to Exemption 5 of the FOIA (5 U.S.C. § 552 (b)(5)) under the following privileges:

**Confidential commercial information
Deliberative process**

Exemption 5 allows an agency to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency” 5 U.S.C. § 552 (b)(5). As such, the Exemption 5 “exempt[s] those documents... normally privileged in the civil discovery context.” National Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). The exemption incorporates the privileges that protect materials from discovery in litigation. These privileges include deliberative process, confidential commercial information, attorney work-product, and attorney-client. See id.; see also Federal Open Market Committee v. Merrill, 443 U.S. 340, 363 (1979) (finding a confidential commercial information privilege under Exemption 5).

Confidential Commercial Information Privilege

When the government enters the marketplace as an ordinary commercial buyer or seller, the government information is protected from competitive disadvantage under Exemption 5. Government Land Bank v. General Services Administration, 671 F.2d 663, 665 (1st Cir. 1982). Exemption 5 prevails “where the document contains ‘sensitive information not otherwise available,’ and disclosure

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would significantly harm the government's commercial interest." Id. at 666; see also Merrill, 443 U.S. at 363.

Pursuant to the confidential commercial information privilege, conference call codes and passcodes have been withheld under Exemption 5. This information constitutes "intra-agency" documents because they are only shared with members of the Department of the Interior for the purpose of conducting official government business. Moreover, this information qualifies as "confidential commercial information" because the government entered the marketplace as an ordinary commercial buyer.

In line with Land Bank and Merrill, the information is "sensitive and not otherwise available." If the information was released, the government's financial interest would be significantly harmed. The conference calls would no longer be private since unknown, non-governmental parties would have the ability to listen in to the calls. The funds spent on purchasing the information would therefore be wasted, and the information would be of no use.

Because we reasonably foresee that the release of this information would significantly harm the government's financial interest by publicizing sensitive information, the Office of the Secretary is withholding it in accordance with Exemption 5 of the FOIA.

Deliberative Process Privilege

The deliberative process privilege "protects the decisionmaking process of government agencies" and "encourages the frank discussion of legal and policy issues" by ensuring that agencies are "not forced to operate in a fishbowl." Mapother v. United States Dep't of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (citing Wolfe v. United States Dep't of Health & Human Services, 839 F.2d 768, 773 (D.C. Cir. 1988)). Three policy purposes have been advanced by the courts as the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. See Coastal States Gas Corp. v. United States Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

The deliberative process privilege protects materials that are both predecisional and deliberative. Mapother, 3 F.3d at 1537; Access Reports v. United States Dep't of Justice, 926 F.2d 1192, 1195 (D.C. Cir. 1991); Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). A "predecisional" document is one "prepared in order to assist an agency decisionmaker in arriving at his decision," and may include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." Maricopa Audubon Society v. United States Forest Service, 108 F.3d 1089, 1093 (9th Cir. 1997). A predecisional document is part of the "deliberative process" if "the disclosure of [the] materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987).

The deliberative process privilege does not apply to records created 25 years or more before the date on which the records were requested.

We reasonably foresee that disclosure would harm an interest protected by exemption 5. Those portions of the documents that have been withheld pursuant to the deliberative process privilege of Exemption

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5 are both predecisional and deliberative. They do not contain or represent formal or informal agency policies or decisions. They are the result of frank and open discussions among employees of the Department of the Interior. Therefore, their content has been held confidential by all parties. Public dissemination of this information would have a chilling effect on the agency's deliberative processes; it would expose the agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine its ability to perform its mandated functions.

Tony Irish, Attorney-Advisor, in the Office of the Solicitor, was consulted in reaching this decision. Leah Fairman, Office of the Secretary FOIA Office, is responsible for making this decision.

Sincerely,

Leah Fairman
Office of the Secretary
FOIA Office